

Panel discussion 1. Licensing and registration in the sphere of audio-visual services

Overview of European standards

Prof. Dr. Peggy Valcke
(KU Leuven – iMinds)

Council of Europe

Relevant texts

- Recommendation Rec (2000)23 of the Committee of Ministers of 20 December 2000 on the independence and functions of regulatory authorities for the broadcasting sector
- Declaration of the Committee of Ministers of 26 March 2008 on the independence and functions of regulatory authorities for the broadcasting sector
- Case law of European Court of Human Rights (e.g. Centro Europa 7 v. Italy; Glas Nadezhda EOO and Elenkov v. Bulgaria; Meltex Ltd and Mesrop Movsesyan v. Armenia...)

Starting point:

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

- BUT: licencing system needs to comply with requirements of Article 10 § 2 ('prescribed by law', 'pursue legitimate aim', 'necessary in democratic society')

Cf. ECtHR (Groppera Radio v. Switzerland; Autronic v. Switzerland; 1990): “[T]he purpose of the third sentence of Article 10 § 1 is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It does not, however, provide that licensing measures shall not otherwise be subject to the requirements of § 2, for that would lead to a result contrary to the object and purpose of Article 10 taken as a whole.”

Standards

- N.B. The power to grant licences may be exercised in respect of many different types of operator, on the bases of type of service (radio or television), means of transmission/reception (terrestrial broadcast networks, satellite or cable), type of frequency (analogue or digital) or geographical coverage (national, regional or local). *The Recommendation does not seek to tell the member States specifically which types of service should be subject to authorisation, as opposed simply to declaration.*

Standards

- Licensing should be task of independent regulator.
- Conditions and criteria governing the granting and renewal of licences should be clearly defined in the law and/or by the regulatory authority.
- Licensing procedure should be clear and precise and should be applied in an open, transparent and impartial manner.
 - Regulator should be involved in frequency plan;
 - Public call for tenders (official gazette, press...), specifying criteria like type of service, coverage, funding, fees and company structure, owners and capital (media transparency!);
 - Selection of candidates on basis of content of tenders, in line with criteria outlined in law/call for tenders;
 - Decisions taken by regulatory authorities should be duly reasoned and open to review by the competent jurisdictions + published and open to public scrutiny.

Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria (2007)

States' power to regulate licensing is subject to judicial scrutiny. The Court affirmed its powers to assess the compatibility of States regulation with the requirements of paragraph 2 (citing *United Christian Broadcasters Ltd v. United Kingdom*, App. No. 44802; and *Demuth v. Switzerland*, App. No. 38743/97).

The grant of a licence may also be made conditional on such matters as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. (para. 44)

- **"Prescribed by law" requires recourse against arbitrariness**

The Court concluded that the interference was unlawful as the NRTC had not held any form of public hearing and its deliberations had been kept secret, despite a court order obliging it to provide the applicants with a copy of its minutes. Furthermore, the NRTC had merely stated in its decision that Glas Nadezhda EOOD had not or had only partially corresponded to a number of its criteria. No reasoning was given to explain why the NRTC came to that conclusion or why it had exercised its discretion to deny a broadcasting licence. No recourse had been given for that lack of reasoning because the NRTC's was not subject to judicial scrutiny. That, together with the NRTC's vagueness concerning certain criteria for programmes, had denied the applicants legal protection against arbitrary interference with their freedom of expression.

- **Importance of effective remedies**

Meltex Ltd & Movsesyan v Armenia (2008)

- As regards licensing procedures in particular, the ECtHR reiterates that the manner in which the licensing criteria are applied in the licensing process **must provide sufficient guarantees against arbitrariness**, including the **proper reasoning** by the licensing authority of its decisions denying a broadcasting licence.
- ECtHR found that NTRC's refusal of a broadcasting licence did amount to an interference. The legislation by which the NTRC had granted broadcasting licences to companies defined the criteria on which the authority was to base its choice in awarding those licences **but did not require NTRC to give reasons for its decision**. NTRC had simply announced the winner of each call for tenders without giving reasons why that company had met the requisite criteria and not B. **A licensing procedure which lacked a requirement to give reasons for its decisions did not provide adequate protection against arbitrary interference by a public authority with the right to freedom of expression.**

Centro Europa 7 v. Italy (2012)

*“...to ensure true pluralism in the audiovisual sector in a democratic society, it is **not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market**. It is necessary in addition to **allow effective access** to the market so as to guarantee **diversity of overall programme content**, reflecting as far as possible the variety of opinions in the society at which the programmes are aimed.”*

*“A situation whereby a **powerful economic or political group** in society is permitted to obtain a position of **dominance** over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom **undermines** the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive.”*

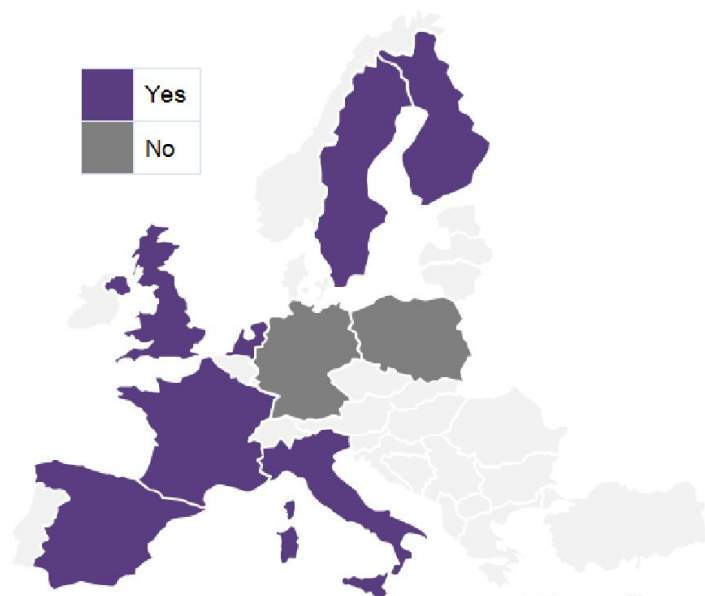
European Union

Relevant texts

- Audiovisual Media Services Directive 2010/13/EU:
 - Country of origin!
 - But: does not harmonize the authorization / licensing regime for the provision of content; practices vary between the countries.
 - On-demand services are usually subject to lighter (licensing / programme / advertising) requirements than linear services
- > Source: Cullen International

	Notification/authorisation?	Fees?
DE	No	No
ES	Yes	No
FI	Yes	No
FR	Yes	No
IT	Yes	Yes
NL	Yes	No
PL	No	No
SE	Yes	No
UK	Yes	Yes

Countries where an authorisation or notification is required to provide VOD services (Cullen research)



European Union

Relevant texts

- Electronic Communications Directives: harmonizes licensing and regulation of networks and transmission services (incl. broadcast networks)
 - Framework Directive 2002/21/EC ---->
 - Authorisation Directive 2002/20/EC
- System of general authorization (Art. 3)
- Individual licences ('rights of use') only in case of scarce resources (frequencies & numbers) (Art.5) ---->

Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law, the rights of use for radio frequencies and numbers shall be granted through open, objective, transparent, non-discriminatory and proportionate procedures, and, in the case of radio frequencies, in accordance with the provisions of Article 9 of Directive 2002/21/EC (Framework Directive). An exception to the requirement of open procedures may apply in cases where the granting of individual rights of use of radio frequencies to the providers of radio or television broadcast content services is necessary to achieve a general interest objective as defined by Member States in conformity with Community law.

Article 3

National regulatory authorities

1. Member States shall ensure that each of the tasks assigned to national regulatory authorities in this Directive and the Specific Directives is undertaken by a competent body.
2. Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.
3. Member States shall ensure that national regulatory authorities exercise their powers impartially, transparently and in a timely manner. Member States shall ensure that national regulatory authorities have adequate financial and human resources to carry out the task assigned to them.

